



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. BABBITT
ATTORNEY GENERAL

May 6, 1977

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Mr. John L. Huerta, Director
Department of Economic Security
Post Office Box 6123
Phoenix, Arizona 85005

Re: 77-98 (R77-17)

Dear Mr. Huerta:

This letter is in response to your request for an opinion concerning the continued viability of an informal opinion rendered by a member of this office in 1974 pertaining to the legal liability of foster parents and the availability of State legal representation for foster parents in civil actions brought against them for acts of their foster children. Due to the nature of your inquiry, our response will be directed to the questions presented in 1974.

You first ask whether licensed foster parents are liable for wrongful acts committed by foster children who are wards of the court committed to the care, custody and control of the Arizona Department of Economic Security and placed in their homes. At common law, each person was presumed to be responsible only for his or her acts. Parsons v. Smithey, 109 Ariz. 49, 51, 504 Ariz. 1272 (1973). Accordingly suit for the wrongful act of a child could be brought against the child and not against his parents. The legislatures in most states, recognizing that injured parties, in many cases, cannot recover from children, have enacted special laws under which liability for damage inflicted by children is imputed to parents. Arizona has followed this trend by enacting several such statutes. One of these, A.R.S. § 12-661, states:

Any act of malicious or wilful misconduct of a minor which results in any injury to the person or property of another shall be imputed to the parents having custody or control of the minor for all purposes of civil damages, and such parents having custody or control shall be jointly and severally liable with such minor for any actual damages resulting from such malicious or wilful misconduct.

Mr. John L. Huerta
May 6, 1977
Page Two

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

The joint and several liability of one or both parents having custody or control of a minor under this section shall not exceed five hundred dollars for each tort of the minor. The liability imposed by this section is an addition to any liability now imposed by law.

Another example of imputed liability appears in A.R.S. § 15-446:

A. A pupil who cuts, defaces or otherwise injures any school property may be suspended or expelled.

B. Upon complaint of the trustees, the parents or guardians of minors who have injured school property shall be liable for all damages caused by their children or wards.

Both of the foregoing statutes impute liability to the "parent," and the latter statute also imputes liability to the "guardian." Thus, if a person is neither a "parent" nor a "guardian," the person is not liable for a child's acts by creation of these statutes.

The courts have defined a parent as "one who begets offspring". Sailes v. Jones, 17 Ariz.App. 593, 597, 490 P.2d 721 (1972). In the context of child welfare and placement, A.R.S. § 8-501.6 defines "parent" as the natural or adoptive parents of the child.

Solomon v. Harman, 107 Ariz. 426, 489 P.2d 236 (1971), decided that foster parents were not entitled to bring a wrongful death action for the death of a foster child, holding that a foster parent is not a "parent" within the meaning of the wrongful death statute. The Court noted that the rights and responsibilities of a "natural" or "adoptive" parent are fixed by law and are generally inapplicable to foster parents. A foster parent, for example, has no obligation to support a foster child. A.R.S. § 8-601 imposes this duty upon "parents." A.R.S. § 46-134.2(c) provides that the Department of Economic Security, not the foster parent, shall provide the cost of care of children who are placed in foster homes.

It is our opinion, based upon the judicial construction of "parent", in Solomon, supra, and Sailes, supra, that a foster parent is not a "parent" within the meaning of A.R.S.

Mr. John L. Huerta
May 6, 1977
Page Three

§§ 12-661 and 15-446 which impute liability to "parents" for certain acts of their child.

A.R.S. § 15-446.B also imputes liability to a guardian. A "guardian" is a person entitled to act by testamentary or court appointment. A.R.S. § 14-1201.18. "Testamentary appointment" is a parental appointment by will of a guardian of an unmarried minor. A.R.S. § 14-5202. "Court appointment" refers to a judicial appointment of a guardian for an unmarried minor. A.R.S. § 14-5204. These statutes have no applicability to the typical foster care situation. It is therefore our opinion that a foster parent is not by virtue of his status as a foster parent,¹ a "guardian" within the meaning of A.R.S. § 15-446.

One other statutory provision which imputes liability is A.R.S. § 28-417.B. This section states:

Any negligence or wilful misconduct of a minor under the age of eighteen years when driving a motor vehicle upon a highway shall be imputed to the person who has signed the application of the minor for a permit or license, which person shall be jointly and severally liable with the minor for any damage caused by such negligence or wilful misconduct (except if the minor furnishes proof of financial responsibility). (Emphasis added.)

Accordingly, if a foster parent signs the application of the foster child for a driver's license or permit, the foster parent would be liable for damages caused by a minor's misconduct when driving a motor vehicle. The foster parents would be indemnified and held harmless by the State in this situation if the foster parent requests and receives permission to sign the application pursuant to A.R.S. § 8-513 from the entity which placed the child in their home. A.R.S. § 8-513 permits the Department of Economic Security or a licensed child welfare agency to give or withhold consent for certain activities for a child. This section states:

1. In those instances where a foster parent is also a guardian, the foster parents status should not necessarily bar imposition of liability under A.R.S. § 15-446.A.

Mr. John L. Huerta
May 6, 1977
Page Four

A. A child may participate in activities and functions generally accepted as usual and normal for children of his or her age group if permission is granted as follows:

1. When the activity by law requires a license, the agency or division that placed the child may give permission upon request of the foster parent.

2. When the activity includes the child leaving the jurisdiction of the court for a period not to exceed thirty days, the agency or division that placed the child may give permission upon request of the foster parent.

3. When the activity is one which is associated with a school or organization not prohibited by regulation of the division, the foster parents of the child may give permission.

B. The state shall indemnify and hold harmless the agency or foster parents for liability that may be incurred or alleged as a result of giving such permission, when such permission is reasonably and prudently given. The state shall provide the defense of any action alleging such liability. (Emphasis added.)

Subsection B requires the State to indemnify and hold a foster parent harmless from liability which the foster parent may incur as the result of A.R.S. § 28-417.B provided that the placing agency granted its permission for the child to obtain the driver's license or permit and provided further that the foster parents' request for that permission was prudent.

The preceding discussion considers liability imputed to foster parents by statute. In some cases a foster parent will be directly liable for damage or injury caused by a foster child. This will occur when a foster parent has acted jointly with the foster child in committing a tortious act, or where the foster parent's negligence contributed to the injury in such a way as to be a proximate cause of the injury. Whether the foster parents' negligence is a proximate cause of damage or injury inflicted by a child depends upon whether the injury

Mr. John L. Huerta
May 6, 1977
Page Five

is the natural and probable consequence of the negligence of the foster parent. For example, if a foster parent is negligent in supervising the foster child and it is foreseeable to an ordinary person that the negligence might result in the child's causing damage or injury, the foster parent may be liable for the resulting harm. See, e.g., Salt River Valley Water Users' Association v. Cornum, 49 Ariz. 1, 63 P.2d 639 (1937). More recently in Parsons v. Smithey, 109 Ariz 49, 504 P.2d 1272 (1973) the Arizona Supreme Court concluded that a parent could be found to have been negligent and, therefore, liable for the child's conduct "where the parent has failed to exercise the care which a reasonable parent should exercise to prevent his child from creating an unreasonable risk of harm to others." 109 Ariz. at 52-53. The Court pointed out that liability turned in that case on the parents ability to identify a behavior problem and predict future conduct. Liability was not imposed in that case because the Court concluded the risk was not foreseeable. We must admit to no clairvoyance in predicting whether liability might be imposed upon the custodial foster parent in some future case under the "foreseeable risk" analysis of Parsons. See, e.g., Grimm v. The Arizona Board of Pardons and Paroles (Ariz. S.Ct. No. 12775-PR April 11, 1977).

Your second question concerns the liability of foster parents for injuries sustained by foster children. A foster parent should not be liable for injury to a foster child absent a showing that the foster parent did not comply with paragraphs 1 and 2 of A.R.S. § 8-513.A or that in some way the foster parent or a natural child of the foster parent engaged in some negligent or intentional conduct which proximately caused the injury to the foster child. However, if the activity is one of those described in A.R.S. § 8-513 and the requirements of that section have been met, the foster parent will be held harmless by the State for any resulting liability.

Your third question concerns the conditions under which the State of Arizona is obligated to undertake legal representation of foster parents who are being sued for acts committed by, or injuries sustained by, foster children. Except for A.R.S. § 8-513, which requires the State to provide the defense of any action alleging liability for injury or damage caused when a child is engaged in an activity authorized in accordance with the provisions of that section, the State is neither obligated nor allowed to defend an action against foster parents. A.R.S. § 41-193.

Mr. John L. Huerta
May 6, 1977
Page Six

As a final point we note that we are not the final arbiter of the financial liability questions posed by this opinion request. Ultimately the Courts may be called upon to determine those questions, and, of course, our opinions are not binding upon the Courts. If the uncertainty inherent in this process is thought by the Department to create a substantial impediment to an effective foster care program, legislation delineating the liability of foster parents to third parties for the acts of foster children in their care should be considered as an alternative.

Sincerely,

BRUCE E. BABBITT
Attorney General

M. Francis Neville

M. FRANCIS NEVILLE
Assistant Attorney General

BEB:MFN:jrs